Supreme Court, U.S.
FILED
DEC 14 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1949

In the Supreme Court of the United States

OCTOBER TERM, 1990

EDWARD TILGHMAN, ET AL., PETITIONERS

v.

ERIC KOLKHORST

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

KENNETH W. STARR
Solicitor General

DAVID L. SHAPIRO
Deputy Solicitor General

AMY L. WAX
Assistant to Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

ROBERT P. DAVIS
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

STEVEN J. MANDEL
Deputy Associate Solicitor
Department of Labor
Washington, D.C. 20210

QUESTION PRESENTED

Whether an employee's right under 38 U.S.C. 2024(d) to a leave of absence from employment to serve in the Armed Forces of the United States is conditioned on the "reasonableness" of the employee's request for leave.

TABLE OF CONTENTS

	Page
Statement	1
Discussion	6
Conclusion	8
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Blackmon v. *Observer Transportation Co.*, 102 Lab. Cas. (CCH) ¶ 11,450 (W.D.N.C. 1982), aff'd, 756 F.2d 1000 (4th Cir. 1985)	8
Burkhart v. *Post-Browning*, 859 F.2d 1245 (6th Cir. 1988)	8
Gulf States Paper Corp. v. *Ingram*, 811 F.2d 1464 (11th Cir. 1987)	3-4
King v. *St. Vincent's Hospital*, petition for cert. pending, No. 90-889	6, 7, 8
Monroe v. *Standard Oil Co.*, 452 U.S. 549 (1981)	5

Statute:

Vietnam Era Veterans' Readjustment Assistance Act of 1974 (Veterans' Reemployment Rights Act) Tit. IV, 38 U.S.C. 2021 *et seq.*:	
38 U.S.C. 2021 (b) (3)	4, 6, 7, 8
38 U.S.C. 2022	4, 5
38 U.S.C. 2024 (d)	3, 4, 5, 6, 7, 8

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1949

EDWARD TILGHMAN, ET AL., PETITIONERS

v.

ERIC KOLKHORST

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order of October 1, 1990, inviting the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioner Edward Tilghman is the Commissioner of petitioner Baltimore City Police Department. Pet. ii. The policy of the Police Department, which employs approximately 2900 officers, is to limit to 100 the number of officers who may serve simultaneously in active military reserve units. Pet. App. 6a. Officers who request to join the active reserves after the 100-person limit is reached are placed on a waiting list until an opening occurs. But new hires who are members of an active reserve unit at the

time they apply for employment with the Department are permitted to remain active reservists even if the Department has reached the 100-person limit. *Id.* at 6a-7a.

Respondent Eric Kolkhorst joined the Baltimore City Police Department in 1982. At that time, he was a member of the Individual Ready Reserve, which is one of two components of the Marine Corps Ready Reserve. Pet. App. 5a. Unlike members of the Selected Marine Corps Reserve, members of the Individual Ready Reserve have no required regular monthly meeting or annual training obligations, and thus are not members of an active reserve unit. *Id.* at 5a-6a. At the time respondent joined the Department, 126 officers were members of active reserve units, and 33 officers were on the waiting list. *Id.* at 7a.

On at least two occasions in December 1985, respondent requested permission from the Police Department to join an active reserve unit. Pet. App. 7a-8a. The Department failed to respond to these requests, and on February 1, 1986, respondent accepted a three-year assignment to a Selected Reserve Unit. *Id.* at 8a. On February 4, 1986, Kolkhorst again requested permission to join an active reserve unit; the Department denied this request, but placed him on its waiting list. *Ibid.* Despite lack of formal Department approval, respondent for several months arranged with his immediate superiors for weekend leaves of absence to enable him to train with his reserve unit. *Ibid.*

When respondent notified his superior officers of his orders to report for annual two-week training in August 1986, the Department investigated his reserve status. Pet. App. 8a-9a. On July 8, 1986, the Department denied Kolkhorst's request for training

leave, and on July 23 respondent received a Departmental memorandum directing him to remove himself immediately from active reserve status. *Id.* at 9a. He complied with this directive on the following day.

2. Respondent then filed this action in federal district court, contending that the Police Department had violated 38 U.S.C. 2024(d) by denying him permission to become an active member of the Marine Corps Reserves, and seeking declaratory and monetary relief. Pet. App. 28a. Section 2024(d) of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, also known as the Veterans' Reemployment Rights Act (VRRA or the Act), states, in pertinent part, that an employee

> shall upon request be granted a leave of absence by * * * [his] employer for the period required to perform active duty for training * * * in the Armed Forces of the United States. * * *

On cross-motions for summary judgment, the district court held that the Department's 100-person limit on the number of officers who may be active reservists violated Section 2024(d). Pet. App. 28a-39a. Acknowledging that the express terms of Section 2024(d) "unequivocally require an employer to give any military reservist in its employ a leave of absence to participate in military training," the court noted that courts "have used a rule of reason as the lubricant necessary to make the statutory machinery function." Pet. App. 32a-34a. The district court recognized, however, that there was disagreement over the factors that should be considered in making a determination of reasonableness. *Id.* at 34a. The court elected to follow the approach taken by the Eleventh Circuit in *Gulf States Paper Corp.* v.

Ingram, 811 F.2d 1464 (1987), which focuses on the conduct of the reservist. Pet. App. 35a-37a. Applying that standard, the court concluded that "[n]othing in the record suggests [respondent] has acted unreasonably or in an improper manner." *Id.* at 37a. The court thus directed the Police Department to grant Kolkhorst's request to join an active reserve unit, and awarded him damages of $4,164 as compensation for lost income and benefits that he would have earned by participating in reserve training. *Id.* at 38a; App., *infra*.

3. The court of appeals affirmed.[1] The court held that the Police Department's refusal to grant respondent's leave request violated Section 2024(d), and that compensation for lost pay and benefits could be awarded under 38 U.S.C. 2022. The court also concluded that the Department's reservist policy violated 38 U.S.C. 2021(b)(3), which prohibits discrimination in employment based on reserve obligations. Pet. App. 11a.

With respect to Section 2024(d), the court held that nothing in the VRRA, its legislative history, or this Court's decisions "indicate[s] that a reservist is entitled to a leave of absence in order to participate in military training *only* if the request is reasonable based on a judicially created standard that varies from one jurisdiction to the next." Pet. App. 19a. The court noted that "the VRRA unconditionally provides that any reservist '*shall* upon request be granted a leave of absence by such person's employer for the period required to perform' " the pertinent

[1] Although the Secretary of Labor had not participated in the district court proceedings, she filed a brief as amicus curiae supporting respondent and participated in oral argument.

duty. *Ibid.* (emphasis added by court). Quoting this Court's decision in *Monroe* v. *Standard Oil Co.*, 452 U.S. 549, 555 (1981), the court observed that under Section 2024(d), "employees *must* be granted a leave of absence * * * and, upon their return, be restored to their position." Pet. App. 19a-20a (emphasis added by court). The court concluded that "the reasonableness standards that have been imposed by other courts are contrary to the purpose of Section 2024(d) to allow reservists to train with their military units without suffering prejudice or any adverse action from their employers." Pet. App. 20a.

The court held in the alternative that even if a standard of reasonableness were applied to Section 2024(d), respondent's leave request was reasonable and the Police Department's 100-officer limit was unreasonable "under any possible formulation of the test." Pet. App. 20a. The court noted that respondent's requested leave was "reasonably made and reasonable in content." *Id.* at 20a-21a. Conversely, the Department's reservist policy is unreasonable because "it prevents any active military training *at all* for individuals like Kolkhorst who are not on the one hundred person reservist list." *Id.* at 22a-23a.

Turning to the question of relief, the court held that full monetary damages for violations of Section 2024(d) are authorized by 38 U.S.C. 2022, which empowers district courts to compensate a reservist "for *any* loss of wages or benefits suffered by reason of such employer's unlawful action" (emphasis added by court). Pet. App. 24a-25a. The court thus rejected the Police Department's argument that Section 2022 applies only to wages and benefits that the employee would have earned from an employer, and not

to income derived from the employee's military duty. Pet. App. 25a.[2]

The court also held that the "Department's official reservist policy" conflicts with Section 2021(b)(3). Pet. App. 13a-14a. This policy, according to the court, clearly precipitated the Department's unlawful order instructing respondent "either to withdraw from the active reserves or face dismissal." *Id.* at 13a.

DISCUSSION

The question presented in this case is whether, under Section 2024(d) of the VRRA, an employee's right "upon request [to] be granted a leave of absence * * * to perform active duty for training * * * in the Armed Forces of the United States" is conditioned on the "reasonableness" of the employee's request for leave. The question is the same as that presented in *King* v. *St. Vincent's Hospital*, No. 90-889, in which the government filed a petition for a writ of certiorari on December 5, 1990.[3]

In this case, as in *King*, the court considered the legality under Section 2024(d) of an employer's denial of a request for leave to perform "active duty for training." The court of appeals here disagreed with the analysis adopted in *King* and in decisions of other courts of appeals that have considered this issue (see Pet. at 18-21 in *King* v. *St. Vincent's Hospital*, No. 90-889), and held that Section 2024(d) does not require that a leave request be "reasonable." As we discussed in our petition in *King*, the Fourth

---

[2] The court upheld as not clearly erroneous the amount of damages awarded by the district court. Pet. App. 26a.

[3] We have served petitioners and respondent with a copy of our petition for a writ of certiorari in *King* v. *St. Vincent's Hospital*.

Circuit's interpretation of Section 2024(d) in this case correctly construes the language of the provision in a manner consistent with its underlying purposes.

In *King*, the Eleventh Circuit ruled that requests for leave under 2024(d) should be analyzed for reasonableness, and that a three-year leave request was *per se* unreasonable. We recommended review by this Court of that decision in light of the potential impact of that ruling on the ability of the reserve components to recruit personnel for lengthy tours of duty, and the potential effects on the reserve components and the Armed Forces as a whole of the disagreement among the courts of appeals on the proper interpretation of Section 2024(d).

In our view, *King* provides a more appropriate vehicle than the present case for resolution of the important question presented by both petitions. In the present case, the court of appeals clearly established, as the law of the circuit, that there is no reasonableness test under Section 2024(d), but it also held, in the alternative, that petitioner's request was reasonable. The court held, in addition, that the employer had violated the anti-discrimination provisions of Section 2021(b)(3). Thus, unlike the decision in *King*, the outcome below might be unaffected even if the court's holding with respect to the existence of a reasonableness test under Section 2024(d) is determined to be in error.

We believe that the appropriate course is to hold this petition pending this Court's disposition of *King*. If the Court grants review in *King* and ultimately decides that no reasonableness test may be imposed under the statute, the present petition could appropriately be denied. If the Court determines that some test of reasonableness is required, we believe that the

court below should be afforded an opportunity to consider the impact of that determination on all aspects of its decision—including its alternative conclusion that the specific request for leave was a reasonable one.[4]

CONCLUSION

The petition for a writ of certiorari should be held and disposed of as appropriate in light of the disposition in *King* v. *St. Vincent's Hospital*, No. 90-889.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT P. DAVIS
Solicitor of Labor

DAVID L. SHAPIRO
Deputy Solicitor General

ALLEN H. FELDMAN
Associate Solicitor

AMY L. WAX
Assistant to Solicitor General

STEVEN J. MANDEL
Deputy Associate Solicitor
Department of Labor

DECEMBER 1990

---

[4] Although the court below also found a violation of Section 2021(b)(3)—a provision not directly involved in *King*—the award of damages appears to have been based solely on the violation of Section 2024(d). See Pet. App. 14a, 24a. Were the Fourth Circuit on remand to find that there was no Section 2024(d) violation, it is not certain that the award would be sustained on the basis of a Section 2021(b)(3) violation alone. Moreover, it has been suggested that the two statutory provisions may not be completely independent in that the statutory requirement of a request for leave might affect entitlement to relief under both Sections 2024(d) and 2021(b)(3). See *Burkhart* v. *Post-Browning*, 859 F.2d 1245, 1247 (6th Cir. 1988); *Blackmon* v. *Observer Transportation Co.*, 102 Lab. Cas. (CCH) ¶ 11,450 (W.D.N.C. 1982), aff'd, 756 F.2d 1000 (4th Cir. 1985) (en banc).

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Civil No. JFM-86-3057

ERIC KOLKHORST

v.

BISHOP L. ROBINSON, et al.

ORDER

For the reasons stated in the opinion entered herein on June 10, 1988 and on the record in open Court on February 10, 1989, it is this 15th day of February 1989

ORDERED

1. The order entered by this Court on June 13, 1988 is hereby incorporated by reference and is confirmed; and

2. Monetary damages are awarded in favor of plaintiff in the amount of $4,164.00, consisting of (a) $1,891.00 of income from lost drills in 1986, (b) $1,733.00 in lost income from summer camp in 1986 and (c) prejudgment interest in the amount of $540.00 (running from January 1, 1987 at the rate of 7% per year).

/s/ J. Frederick Motz
J. FREDERICK MOTZ
United States District Judge

☆ U. S. GOVERNMENT PRINTING OFFICE: 1990 282081 20246